United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2116

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2116

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

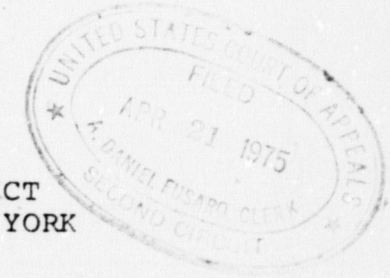
Defendants-Appellants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Preliminary Statement

This brief is submitted by defendants-appellants (hereinafter "defendants") in reply to the brief for plaintiffs-

appellees (hereinafter "plaintiffs"). This brief is limited to the following issues raised in plaintiffs' brief: the alleged racially disproportionate impact of examination no. 34-944 for Correction Sergeant (Male) and prior examinations for that title (Plfts. Br. pp. 6-12, 17-19); the alleged lack of job-relatedness of examination no. 34-944 (Plfts. Br. pp. 20-35); the appropriateness of the award of fees to plaintiffs' attorneys (Plfts. brief, pp. 46-55).

1. Examination No. 34-944 did not have a disproportionate impact on Black and Hispanic candidates generally.

Plaintiffs' description of examination no. 34-944 as administered for the purpose, inter alia, of establishing one pool of eligibles for appointment as Correction Sergeants does not detract from defendants' view that ethnic differences in candidate performance on the examination are more accurately shown by defendants' within facility passpoint comparisons than by plaintiffs' comparisons in the statewide pool. See

Plfts. brief, p. 16 and Defts. main brief, pp. 29-47.*

As plaintiffs concede, their prima facie case depends on their ability to show that "examination [no. 34-944] has had disproportionate adverse impact upon a racial or ethnic group." Plfts. brief, p. 15. Yet, plaintiffs' insistence on their poolwide comparisons and the district court's preference for those comparisons (A. 154-164) are diametrically

*Plaintiffs urge that the passpoint comparisons in the statewide pool are enhanced because passing Whites (and apparently some passing Blacks as compared with passing Hispanics) obtained scores on the examination which would enable them to obtain a greater number of positions than their proportion in the overall passing pool. Plfts. brief, p. 16; Opinion of the District Court A. 154-155. Assuming arguendo the relevance of this claim to the disproportionate impact of an examination, the facts do not support the contention. Exclusive reliance is placed on the computer display (Plfts. Ex. "12," A. 1343-1348) which shows only candidates' raw scores omitting seniority credits and veteran preference credits which are added to the raw score to determine a candidate's rank on the eligible list. Thus one cannot project the order of appointment from the computer display. Moreover, reference to the eligible list although necessarily speculative, opposes rather than supports plaintiffs' position. This list of candidates in rank order is subject to numerous contingencies which result in the selection of candidates out of turn. It is canvassed for acceptors for geographic locations; any eligible may be passed over; and, of course, any eligible may decline. N.Y. Civil Service Law §§ 53, 61. For example, at the time of trial, slightly less than four months after the eligible list had been established and with a maximum of three years and eight months to run, candidates through 109 had been provided with an opportunity for appointment or passed over. T. 40-41. A. 287-288. In light of this fact, plaintiffs' contention (and of that district court, A. 155) that only the first 157 candidates would be reached during the life of the list is obviously error.

opposed to this description of the prima facie case. As defendants' proof established, plaintiffs' poolwide comparisons do not reflect ethnic differences "on the examination" but instead mask those differences by failing to differentiate between an "ethnic effect" and at least one other discrete and ethnicly unrelated variable, "facility effect".*

*Plaintiffs did not offer any proof in opposition to defendants within facility comparisons. Defendants main brief, pp. 33-34. Their argument in this Court simply repeats Judge Lasker's view that defendants' comparisons sought to "explain" ethnic difference and that the conclusions of non-significance were inconsistent with differences which the Judge thought to be "significant" or large. Plfts. brief, pp. 17-18. Judge Lasker's errors on these two points are discussed in defendants' main brief, pp. 35-47. In an effort to bolster Judge Lasker's characterization of the within facility passpoint comparisons between Whites/Blacks at Green Haven and "other facilities" and between Whites/Hispanics at Ossining as significant when they are not significant in fact, plaintiffs urge the novel view that "statistical" significance is not required to demonstrate disproportionate impact resulting from an examination if the apparent differences are "substantiatial." Plfts. brief, pp. 17-18. Compare Defendants main brief, pp. 41-42. This view misapprehends both the meaning of statistical significance and the obligation upon plaintiffs to establish a prima facie case. Statistical significance is a statement that the probability that a difference (event, etc.) under consideration has occurred by chance are 5 in 100 or less (expressed as .05). By convention, it is the point at which a statistician permits himself to conclude that an observed difference is due to something other than chance or accident. It has been adopted by the case law in this field as the benchmark between those differences which are cognizable under law and those which are not, i.e. the non-significant difference is too unreliable to form the basis of a legal obligation. Chance v. Board of Examiners, 330 F. Supp. 203, 211-212 (S.D.N.Y. 1971) aff'd 458 F. 2d 1167 (2d

In contrast, defendants' within facility comparisons "screen out" the irrelevant facility effect variable and thus provide the more accurate measure of ethnic difference in candidate performance on the examination.* The use of these comparisons shows that examination no. 34-944 had a disproportionate impact only on Ossining Blacks and thus that the class, defendants' proof of job-relatedness at trial and any preferential relief in the form of quotas or goals should have been confined to them and to claims properly interposed on their behalf.

(Footnote cont. from preceding page)
Cir. 1972). Necessarily, the plaintiffs must establish their prima facie case by showing significant statistical (as opposed to "chance") differences between ethnic groups on an examination. Defts. main brief, p. 41. Once shown to be significant such differences may be assessed in terms of their substantiality. Defts. main brief, p. 28. Equally, no difference which is not itself "statistically significant" (i.e. one which permits a high degree of statistical and legal confidence in its very existence) can be characterized "substantial" or otherwise "significant" if any legal consequences follow therefrom.

*Contrary to plaintiffs' characterization of defendants' argument (Plfts. brief, p. 17), we do not contend that the "overall disparity is the result of 'facility effect', not ethnicity, ... [which] can only be 'screened out' by comparing white-minority performance at each facility ...." Defendants' point is rather that the poolwide or "overall" disparity in part reflects facility effect; that that part of the disparity is unrelated to ethnic differences in test performance but reflects instead the distribution of the candidate pool at discrete facilities which affect white and minority performance in the same way; that in order to consider ethnic difference on the examination it is therefore appropriate and indeed necessary to "screen out" the unrelated facility effect variable; and that the within facility comparisons offered by defendants constitute a professionally sound means for achieving this purpose albeit other equally adequate methods may be available which do not from the record or from Plaintiffs' brief.

2. There is no proof of any disproportionate impact or "pattern of discrimination" resulting from Correction Sergeant or other supervisor examinations prior to examination no. 34-944

Plaintiffs urge that disproportionate impact from the past examinations is established by reference to the passing rate comparisons for the 1970 Correction Sergeant examination (no. 34-007) and by the alleged underrepresentation of minorities in the supervisory ranks (the combined Sergeant, Lieutenant and Captain titles). Plfts. brief, pp. 7-8, 10-13.*

*In making this argument, plaintiffs must acknowledge the validity of defendants' position that the district court's injunction to appoint 1 minority candidate to the title of Correction Sergeant for every 3 White candidates until the combined percentage of Blacks and Hispanics in that title equals the combined percentage of Blacks and Hispanics in the Correction Officer title (A. 243-244) cannot be sustained on the basis of the invalidity of examination no. 34-944. The district court effectively erased any disproportionate impact resulting from no. 34-944 by enjoining defendants from making any "permanent or provisional appointments based" on that examination and "in any way acting upon the results" (A. 242) and by mandating the use of new, substituted interim and final selection procedures. Thus the illegal acts which the preferential appointment ratio is intended to cure must have occurred prior to 34-944, if at all (A. 242-244). See Defts. main brief, pp. 123-129, Plfts. brief, pp. 41-42.

Their argument on these two points rests on a wholly inadequate evidentiary foundation and, alternatively, if the evidence is considered adequate, that evidence shows an absence of adverse minority impact in the supervisory ranks.

The 1970 Sergeant Examination (no. 34-007)

The only evidence of disproportionate impact with regard to the 1970 Sergeant examination is a comparison of passing rates (Plfts. brief, pp. 10-11) drawn from a computer display for that examination provided by defendants during the discovery (Plfts. Ex. "28", A. 1436-1444). Defendants objected at trial to any inferences of disproportionate impact drawn from this material (T. 4-7, A. 251-254) and advised the plaintiffs (initially by letter during discovery) and the district court (See Defts. Post-Trial Memorandum, p. I-27) that the display was incomplete. It was compiled from ethnic data on individuals in actual service as of January 1, 1973. Thus, it does not include any individual who retired, quit, was fired, etc. in the intervening three years between examination no. 34-007 and the date the data was retrieved. As a result, approximately 100 candidates are "missing" from the

display. Neither their ethnicity nor their score on examination no. 34-007 is known.

Defendants' statement of the incompleteness of the display was not disputed in any regard. Further, plaintiffs failed to call any witness to attest to either the reliability of the data for the purpose of making passing rate comparisons or to statistical significance or lack of significance of those comparisons assuming they could be made. In sum, plaintiffs failed to undertake even the most minimal prima facie showing with respect to the impact of the 1970 Sergeant examination, Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d 1029, 1031 (3rd Cir. 1973) affirming in part, vacating in part and remanding in part, 348 F. Supp. 1084 (E.D. Penn. 1972), and it is highly doubtful that they could have made a successful showing based on the available data.*

*That defendants' low estimate of plaintiffs' likelihood of success is correct may be illustrated as follows: Given the relatively small number of minority candidates (40 Blacks A. 1436-1437, and 1 Hispanic, A. 1439) shown on the display and the relatively low passing rate for Whites (94 out of 997, A. 1442-1444 or 9.4%) shown, the minority passing percentage would be half the White percentage with the addition of two minority passers from the "missing" group would probably not be considered substantially disproportionate if there were three "missing" minority passers and would equal the White percentage if there were four "missing" minority passers. That there are likely to be "missing" minority passers was attested to by plaintiff Kirkland who noted that Ben Thompson had passed an examinations prior to 34-944 and had been reached for appointment but had left the Department of Correctional Services. T. 237, A. 474.

Even if the requisite showing of disproportionate impact had been made with respect to examination no. 34-007, discrimination (which subsumes both the questions of impact and job-relatedness) could not be established on the present state of the record. Defendants repeatedly objected at trial to any inference of lack of job-relatedness from a statement of the passing rates in the absence of an adequate opportunity to present affirmative evidence of the job-relatedness.* T. 4-7, A. 251-254; T. 14, A. 261; T. 97-98, A. 344-345; T. 231, A. 468, Defts. main brief, pp. 127-128.

*Plaintiffs' theory that the lack of job-relatedness of examination no. 34-007 or other past Sergeant examinations can be inferred because those exams were cut "from the same cloth" as 34-944 is also without foundation in the record. Plfts. brief, pp. 13, 27-28, 41. The scope of 34-944 was different from 34-007, the weighting of the law subtest was different; there was added emphasis in inmate resocialization and rehabilitation; and every item was new T. 531-533, A. 767-769. As Mr. Siegel stated (T. 533, A. 769): "[T]hey [34-944 and 34-007] are not the same examination at all" under any kind of professional standard. See Defts. main brief, pp. 76-80. Indeed, plaintiff Kirkland attested to the fact that 34-944 was different from past examinations. T. 231, A. 168.

Alleged underrepresentation of minorities in the supervisory ranks

Plaintiffs admit that there is "no data" in the record concerning the impact of Sergeant examinations prior to 1970 (and, as shown above, the data for that examination is inadequate to demonstrate adverse minority impact). Plfts. brief, p. 11. There is no data concerning any other supervisory examinations. Their claim of underrepresentation in the supervisory ranks relies entirely upon their statement that there have been only two Black* and no Hispanic supervisors over the past twelve years. Plfts. brief, p. 11. It is not properly interposed since it infers disproportionate impact from statistical data not in evidence** and a lack of job-relatedness of examinations on which defendants were not provided an opportunity to submit proof. See discussion above, p. 9 However, accepting the propriety of the claim arguendo, review of the evidence available in the record shows that the claim of only two Black supervisors and Black or minority underrepresentation in the supervisory ranks to be ill-founded.

* Now Captain Harris and Lieutenant Hill.

**For example, in the absence of any passing rate data, the inference that there were few Black or Hispanic supervisors because there were few minority candidates participating in the supervisory examinations is as reasonable as the inference that the examinations produced an adverse disproportionate impact on minority candidates. The likelihood that the former rather than the latter inference is correct may be illustrated by the relationship between plaintiffs' statement that there were no Hispanic supervisors and their reliance on the 1970 Sergeant examination computer display which shows only one Hispanic candidate on that examination. Plfts. Ex. "28", A. 1439-1440.

Any conclusion of minority underrepresentation in the supervisory ranks must depend on a comparison between the number of minority individuals eligible for promotion to those ranks, i.e. those who meet the time-in-service requirements for the successive titles, and the number of such individuals who were appointed or would have been appointed but for contingencies unrelated to their minority status and/or their examination performance.*

According to the testimony of the plaintiffs, there were between 51 (Kirkland T. 235, A. 472) and 75 (Hayes T. 185, A. 422) minority Correction Officers who were eligible to take the 1970 Sergeant examination. There were approximately

*The Correction Officer series is a closed promotional system, i.e. appointment to the supervisory ranks is only open to those appointed initially to the entry level Correction Officer position. No claim was made below that this system was itself discriminatory either at the time of 34-944 or at any time in the past. No claim was made that the time-in-service requirement for eligibility to participate in 34-944 or any past time-in-service requirement for any supervisory promotion was discriminatory. Plaintiffs' claim against the entry level Correction Officer examinations was withdrawn at the outset of the trial. T. 5, A. 255.

25 Black Officers eligible to take the 1968 Sergeant examination, and approximately 10-15 Black Officers eligible for the 1965 Sergeant examination (Kirkland T. 234, A. 471). As of May 1, 1973, plaintiffs state that there were a total of 237 supervisors. Plfts. brief, p. 7.* As of January 1, 1973, there were approximately 4120 Correction Officers. See footnote below for citation to sources and basis for selection of the January 1, 1973 figure.

As noted, approximately 75 (or less) minority Correction Officers, or 1.9%, of the total Correction Officer complement were eligible to take the 1970 Correction Sergeant examination or any other preceding first line supervisory examination.**

* Information provided by defendants and offered by evidence by plaintiffs shows that there were 318 filled supervisory positions in the Correction Officer series as of January 1, 1973 and 331 filled supervisory positions as of May 1, 1973. Plfts. Ex. "3", A. 1288-1302; Plfts. Ex. "31", A. 1447; Plfts. Ex. "32", A. 1448. Plaintiffs use of the figure 237 (Brief, p. 7) apparently tries to distinguish permanent appointees from approximately 85 pre-34-944 provisional appointees (including 10 Blacks). For purposes of the comparisons here in issue, defendants adopt the January 1, 1973 figure of 318 as both representative of the supervisory complement for a period prior to 34-944 and most favorable to plaintiffs. I.e., the testimony of Gerard Ryder supports the widely accepted fact that there has been a substantial increase in the number of prison personnel over recent years. T. 52-59, A. 299-306. Thus, for purposes of establishing underrepresentation in the supervisory ranks prior to 34-944, it is likely that the minority percentage would be properly established in relation to a less numerous supervisory complement.

**75/4120 = 1.9%.

With respect to the number of minorities who were or could have been supervisors, the record establishes that during the approximate period between 1965 and 1970, two Blacks (Harris and Hill) passed Correction Sergeant examinations and were appointed;* two other Blacks passed Correction Sergeant examinations (Cheatham and Thompson) and would have been appointed but for irrelevant contingencies (T. 237, A. 474);** and one Black (witness Liburd) passed a Sergeant examination but was not reached for appointment prior to the expiration of the eligible list. T. 306-3-7, A. 543-544. Again taking the view most favorable to plaintiffs, at least four minority individuals could have obtained permanent supervisory appointments on the basis of their final scores (examination raw score, seniority credits, etc.) and the fact that they were reached for appointment. Four such appointments would have represented 5.3% of the minority individuals eligible to become supervisors and 1.3% of a supervisor complement of 318 men. These figures show both that a substantial percentage of minority Correction Officers could have obtained permanent supervisory appointments and

* Harris was appointed in 1967. He became a Lieutenant in 1970 and a Captain in 1972. Appendix 1, Harris Resume, Defts. main brief. Hill was appointed Sergeant in 1968 and is now a Lieutenant. T. 39, A. 286

**Cheatham refused appointment and Thompson was terminated for reasons unrelated to his test performance apparently at approximately the same time he was reached on the eligible list. T. 237, A. 474.

that their representation in the supervisory ranks would not have been disproportionate to the percentage of eligible minorities in the underlying Correction Officer title, i.e. 1.9% minority eligibles v. 1.3% minority supervisors.

From the foregoing discussion, it is apparent that the fact that there were few minority individuals who were or could have been appointed to the supervisory ranks prior to 34-944 was not the result of disproportionate impact from those past examinations but rather the result of the fact that there were few Blacks and almost no Hispanics eligible to participate in those examinations.*

This scarcity of minorities eligible for supervisory examinations would ordinarily require study of the passing rates of ethnic groups on the past, entry level Correction Officer examinations since those examinations determined the pool of candidates who could compete for promotions. However, plaintiffs specifically placed these examinations outside the scope of the action, and no passing rate data is available in the record. T. 5, A. 255.

*The computer display shows only 1 Hispanic candidate for the 1970 Sergeant examination (Plfts. Ex. "28", A. 1439-1440), and plaintiff Kirkland testified that there were no Hispanics eligible for the supervisory examinations administered prior to 1970. T. 234-235, A. 471-472.

However, assuming arguendo the Court looks to the entry level positions, there is no basis for any inference of disproportionate impact resulting from those examinations. In the absence of passing rate data, the "reason" that there were few minority Correction Officers may be either that few minorities applied for employment in the state Correction Officer series (where the majority of the facilities to which an employee could be assigned are geographically remote from metropolitan centers in the state where minorities were concentrated) or that the entry level examinations had a disproportionate impact. Since both "reasons" or inferences are equally likely, a legal result which relies on the latter alone cannot be sustained.

Moreover, even if one were to assume that the entry level examinations (none of which plaintiffs placed in issue) had some speculative effect in the distant past, no such effect remained at the time 34-944 was administered. Whereas the 1970 computer display shows that only 46 Blacks and 1 Hispanic competed in that Sergeant examination, the 34-944 display shows that 104 Blacks and 16 Hispanics competed. Compare Plfts. Ex. "28", A. 1436-1440, with Plfts. Ex. "12", A. 1343-1346. The record also establishes the fact that there was

substantial increase in the number of minority Correction Officers during the approximate period 1961 to 1973. For example, plaintiffs' witness, provisional Sergeant Young testified that at Green Haven in 1961 there were 5 or 6 Black Correction Officers, no Hispanic Officers and 250 White Officers, but as of the date of trial (July 23, 1973) there were 73 Black Officers, 50 Hispanic Officers and 390 White Officers. T. 38, A. 285. See also testimony of plaintiff Kirkland, T. 238-239, A. 475-476, and plaintiff Hayes, T. 154, A. 392. Indeed, the time-in-service requirement for 34-944 was reduced to two years to take the examination (three years for appointment from the list) in large measure to provide a promotion opportunity for the "new" minority Correction Officers. T. 456, A. 692.*

*The statment of plaintiffs' counsel that "the record is utterly barren of any affirmative efforts of any nature to overcome discrimination" (Plfts. brief, p. 44, emphasis original) is remarkable for the following reasons: Plaintiffs' counsel deposed Dr. Allan Bush, affirmative action officer for the Department of Correctional Services, who described the Department's efforts to recruit more minority Correction Officers which, in defendants' view, is the proper level for affirmative action in a closed promotional system; this deposition was not referred to during trial since plaintiffs withdrew their challenge to the Correction Officer title but is on file in the district court. Even disregarding the existence of the deposition, the fact of the substantial increase in the percentage of minority Correction Officers attested to by plaintiffs' own witnesses shows either the existence of a successful affirmative action program or the absence of any need for such a program.

3. Examination No. 34-944 was content valid and if not content valid, nonetheless job-related.

Examination No. 34-944 was content valid.

Plaintiffs do not disagree that an examination must be found content valid if both a test development process designed to ascertain and ultimately test "suitable samples of essential knowledges, skills or behaviors composing the job in question"* was followed and that process was executed by competent individuals. Defts. main brief, pp. 53-61.** Their opposition to the content validity of 34-944 relies largely on objections to certain segments of the test development process there involved and to the competence of some of the responsible individuals on the grounds that they did not meet some underlying, professional standard. Pltfs. brief pp. 21-30. On defendants' view, there is no applicable professional standard which was not met in the preparation of 34-944, and many facts on which plaintiff (and the

* I EEOC Guidelines §1607.5(a), Plfts. Ex. "27", A. 1432.

** Defendants do not take plaintiffs' reference (Brief, p. 20) to Vulcan Society of the New York Fire Department v. Civil Service Commission of the City of New York, 490 F 2d 387, 395 (2d Cir. 1973) and Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission, 482 F 2d 1333, 1338 (2d Cir. 1973) as urging a higher standard than that set forth in the EEOC Guidelines in force at the time of 34-944. To the extent that the district court specified that determinations of "relative importance" and "level of difficulty" were part of a professionally adequate test development process, these determinations may be viewed as subsumed within the EEOC definition of content validity or "well-developed" test [(§1607.5(a)] and if not subsumed, they were in any event consciously undertaken for 34-944. See Defts. main brief, pp. 53, 63-64, 79-80, 81-83.

district court, A24-38) rely to support their view are clearly inconsistent with facts established by the record.*

1. "Job Analysis"

Plaintiffs admit either a "job analysis" or a "detailed job description" will suffice to support a content valid examination. Pltfs. brief, p. 21. They point to no professional standard which requires the "analysis" or "description" be contained in a single document or in documentary form at all particularly when, as in the preparation of 34-944, the persons doing the "analysis" or creating the "description" are themselves the test users rather than test publishers for remote and separate users. A.561-564. All that is required is that the test preparers obtain a "thorough knowledge of the job" (Vulcan, 360 F. Supp. at 1274) such that one may have confidence that their selection of the sample K, S & A's was in fact "suitable". EEOC Guidelines §1607.5(a), Pltfs. Ex. "27", A. 1432; Defts. main brief, pp. 63-91.

As set forth in defendants' main brief (pp. 64-76), the job analysis for 34-944 was co-extensive with the test develop-

*Defendants' main brief establishes the test development process for 34-944 as sound (Brief, 62-84) and the competence of the individuals involved as professionally adequate (Brief, pp. 84 and Appendix 1). These areas are considered below only to the extent of resolving disputed points raised in plaintiffs' brief. The format adopted in defendants' main brief, pp. 63-91, is followed herein. Essentially the same format is followed in plaintiffs' brief, pp. 21-30.

ment process and relied on documentary sources* updated, detailed and organized in terms of subject matter areas and their emphasis and job tasks tested with the participation of knowledgeable Corrections personnel.** The result of the process is shown by the subtest descriptions (Pltfs. Ex. "3", A. 1322-1324; Pltfs. Ex. "8", A. 1332-1336) and by the test itself. Pltfs. Ex. "18", A. 1355-1368 and Ex. "19", A. 1369-1371)***

*The job audits (Defts. Ex. "E", A. 1516-1695; T. 519-520, A. 755-756), class specifications (Pltfs. Ex. "4", A. 1327-1329, the Rule Book (Defts. Ex. "O"), Corrections Law, departmental training materials and "outside" sources such as the Manual of Correctional Standards. T. 421, A. 757; T. 667-668, A. 905-906.

**For 34-944, Corrections personnel participated in the scope conference; approved the eligibility requirements and final scope statement; approved the weight assigned to each subject matter area; participated in the development of the subtest descriptions in terms of the tasks and situations selected and K, S & A's to be tested; assisted in writing all the items on the Laws, Methods and Judgment subtests; and approved all the items on the test. Defts. main brief, footnote p. 55.

***Plaintiffs discount the subtest descriptions in part because they were not used to prepare the examination (Brief, p. 24). I.e., They were developed concurrently with the items and thus were the final stage in the test development process and demonstrate conclusively that a test development process was in fact followed. They reflect the distellation of all the data gathered organized for testing (as opposed to classifying) purposes. There is no evidence that this practice of concurrent development of the subtest descriptions and the items is a violation of any professional standard. See Defts. main brief, pp. 68-69.

The fact that many sources of information both written and oral were consulted during the job analysis and that no one "souces" or piece of information is itself a job analysis accords with the Civil Service Department's Text for Training Personnel Examiners, recognized as authoritative for establishing passpoints at pp. 29-30 of plaintiffs' brief. The text states in part (Defts. Ex. "J", A. 1735):

> Each source of information may constitute something of unique value for test palnning purposes. Each has advantages and disadvantages and the skillful test specialist will need to balance information obtained from different sources in order to arrive at an accurate and realistic basis for examination planning.

Reference to the sources listed in the text (A. 1731-1734) and the record in the case at bar shows that each relevant source was consulted for 34-944. The source references and record references are as follows: Job ("class") specifications (Text: A. 1731: record: T. 421, 422, A. 757-758);* classification

*Plaintiffs' contention that the class specifications were "unchanged since 1962" (Brief, p. 13) is incorrect. The record establishes that the specifications as they existed in June 1962 (A. 1474-1476) were revised in March 1964 (A. 1477-1479), June 1967 (A. 1480-1482), September 1971 (A. 1433-1485). The changes emphasized the growing role of the Correction Officer series in inmate resocialization and rehabilitation. As the text makes clear, the specifications are a "starting point" (A. 1731) for job analysis. They are not intended to provide detailed descriptions of the job, and Mr. Siegal did not presume that they did. He relied on his three Corrections consultants for that purpose as well as on the judgment of Commissioner Quick and his own observations and discussions.

records (text: A. 1732: record: T. 420. A. 756)*; old examination folders (text: A. 1732: record: T. 530-531, A. 766-767); other published documents (text: A. 1732: record: T. 667, A. 903); recruitment or test development bureau staff (text: A. 1732: record: T. 529, A. 765); conferences with agency (text: A. 1733: record: T. 529, A. 765, T. 550 et seq, A. 786 et seq.); job audits (text: A. 1733: record T. 519-520, A. 755-756; T. 668-669, A. 904-905);** consultation with experts [text: A. 1773: record: T. 666,

*As the text states (A. 1732), background material other than class specifications or audits may be contained in the classification folders. See e.g. A. 1565-1581, 1629-1631, 1632-1642

**Kenneth Siegal used the job audits to familiarize himself with the Correction Officer series. T. 521, A. 757. He did not "write" 34-944 from the audits, and there was no professional or legal obligation upon him to do so. Compare Pltfs. brief, pp. 23-24. Defendants did not contend that the "details" for the examination or changes in the job after 1970 were provided by the audits (Compare Barrett, plaintiffs' experts witness, T. 897-898, A. 1135-1136 and Pltfs. brief, p. 23) but rather by the live presence of the Corrections consultants during the test development process. That the audits are helpful is shown by the fact that they provide four basic types of information relevant to the Sergeant job. First, they describe specific Sergeant tasks and activities (e.g. A. 1535 - supervising CO's in specific areas and maintaining security in work programs; A. 1551-1552 - making rounds to inspect areas and performance of Correction Officers, instructing new officers, assisting with inmate problems; A. 1592 - charge of recreation programs). Second, they describe specific Sergeant posts including the number of C.O.'s supervised (e.g. A. 1604 - tower posts, outside gangs, industrial shops and buildings, hospital, segregation; A. 1535 - yards, kitchen; A. 1556 - supervise 15 C.O.'s within area. Third, they generally and specifically describe the work assignments of Correction Officers. Fourth, they describe inmate activities and programs. The relevance of the last two areas is apparent since Sergeants must supervise, train and evaluate Correction Officers, and both the Sergeant and the Correction Officer bear responsibility for the security and welfare of inmates. The Court is respectfully referred to the audits for Auburn (A. 1530-1542), Elmira (A. 1543-1564), Green Haven (A. 1582-1613), Cocksackie (A. 1647-1655) and Wallkill (A. 1656-1671) as particularly helpful. Compare Pltfs. brief,

A. 902 (subject matter experts at institutions visited) and Defts. main brief, p. 55 footnote].* In effect, every activity relevant to a professionally adequate job analysis for 34-944 was in fact carried out. As Dr. Taylor stated, if procedures outlined in the diary excerpts (Pltfs. Ex. "10", A. 1339-1348) were followed/they would constitute the "steps necessary but not necessarily sufficient to the development of a series of job related tests"(T. 809, A. 1045)**

Footnote continued from preceding page.
p. 23, arguing that audits are primarily concerned with Correction Officers, not Sergeants. That the audits were conducted in response to a reclassification request did not make them less helpful to Mr. Siegal. As noted in defendants main brief pp. 74-75, that request was predicated on the theory that the Sergeant job (and others in the series) had changed, and thus it was the purpose of the audits to find out what the duties were to determine if they had in fact changed. Moreover, as the example plaintiffs cite shows (Brief, p. 23), the Sergeant reclassification to salary grade 17 as a result of the audits was not relied on by the test preparers. The Supervision subtest was appropriate for "firstline" supervision notwithstanding that in the Correction Officer series the first line supervisor earned a grade 17 salary rather than grades 10-14. Equally, material that was appropriate for entry level positions (usually below grade 17) in series with more "paperwork" was properly selected for the Report Preparation subtest. In sum, the material for the subtests was not selected by salary grade but on the basis of whether the degree of knowledge, skill or ability reflected matched the Sergeant job. The basic qualifications of the individuals who conducted the audits are established by Defts. Ex. "C", A. 1493-1496. Compare Pltfs. brief, p. 22.

* Two areas cited in the text, "MSD or Regional Offices" and "State Supervisory Agencies", (A. 1732) are not relevant to the development of a test like 34-944 where the state agency is the appointing authority.

**As pointed out in defendants' main brief, pp. 84, Dr. Taylor's use of the term "necessarily sufficient" referred only to the fact that he could not assess the competence of the individual involved. That function was performed by Commissioner Quick with respect to the subject matter experts involved (Defts. brief, pp. 85-86) and by the examination statistics, e.g. Kuder-Richardson, item analysis and difficulty levels, which demonstrated that the test was a competent measuring device. Defts. main brief, pp. 80-83, 91-94.

2. The use of a multiple choice written test, the scope of 34-944; and the assignment of unit weights of one to each of the five subtests.

These matters are considered in defendants' main brief at pp. 76-80. We note briefly that the written multiple choice test was not the "only procedure" used in selecting candidates on 34-944, it was the only part of the procedure challenged by plaintiffs. Pltfs. brief, p. 27. The other elements in the selectionprocess were the time-in-service requirements to take the examination, the requirement that all candidates have obtained satisfactory performance ratings in the preceding year, and the addition of seniority and veteran preference credit (where applicable) to establish rank on the resulting eligible list. Defts. main brief, pp. 77-88.* Further, the assignment of unit weights of one to each subtest was not done to allow for statistical reliability studies (Pltfs. brief, pp. 28-29), but was rather a conscious determination made by Mr. Siegal, concurred in by the subject matter experts including Commissioner Quick, and a difference from past examinations. Defts. main brief, pp.79-80

*While apparently taking exception to the use of a multiple choice written test as one of the elements in the selection procedure, or the central element in that procedure, plaintiffs still do not suggest an alternative for testing the 1441 candidates who were involved. Pltfs. brief, p. 27; Defts. main brief, pp. 77-79.

On defendants' view, the only support that plaintiffs may draw from record to oppose the defendants' choices in this area is the fact that the scope of 34-944 was similar to (albeit not identical with) the scopes of past Sergeant examinations. Pltfs. brief, pp. 13-26. There is no question that the scopes were in fact similar, and indeed, there was no opposition to the areas defined by the scopes as inappropriate. There is equally no question that 34-944 was not the same as any past Sergeant examination under any kind of profession standard T. 533, A. 769*, and thus the similarity in scopes was not evidence of "slavish imitation" of the past. Indeed, plaintiffs' psychometric expert, Dr. Barrett, never suggested the similarity in scopes could be so considered.

3. The passpoint

That the passpoint on a written civil service examination cannot be set higher than 70% of the material under state law does not subordinate the "paramount goal" of job relatedness to administrative efficiency. Compare Pltfs. brief, pp. 29-30.

*All the items on 34-944 were new (T. 532, A. 768); the weight laws subtest was different; the total number of items was different, and the emphasis and substance of the items was different. T. 531-533, A. 767-769; T. 690 et seq., A. 926 et seq. See Defts. main brief, p. 56.

First, there is obviously not such a thing as a job related passpoint. Rather, the passpoint determines the level of knowledge of the candidate who is last reached for appointment, i.e. assuming a job sample test like 34-944, the lower the passing score, the less the candidates close to that score know about the job. Defendants agree with plaintiffs that the passpoint should not be set so low that candidates with inadequate knowledge of the job are reached for appointment. Pltfs. brief, pp. 29-30. Equally, professional standards support defendants' view that the passpoint must be set at some level which insures that there will be sufficient, knowledgeable candidates available for selection. Defts. main brief, pp. 83-84. Second, setting the passpoint at 70% of the material defines a group of candidates who are more (or most) knowledgeable about the job, not less knowledgeable. This is best illustrated by the fact that with a 70% requirement, relatively few candidates passed 34-944. Further, it was not even suggested by Dr. Barrett that candidates who obtain such a score on a content valid "job sample" test (where the passpoint is always a judgmental rather than an empirical function) would be considered insufficiently "knowledgeable".

The fact that the boundary line defining the high candidate group is codified under civil service rules serves the important public purposes involved in that testing program: the candidate is entitled to uniform and publicly noticed conditions of competition; and he is entitled, by Department policy if not

by statute, to information enabling him to estimate his chances for promotion within the particular series he seeks to join.

Plaintiffs' opposition to competence of the individuals involved in the test development process is confined to Kenneth Siegal and Hylan Sperbeck Plts. brief, pp. 24-25.* Again, Commissioner Quick's qualifications as well as his role in 34-944 are omitted entirely. See Defts. main brief, pp. 85-86.

Kenneth Siegal's qualifications are reviewed in detail at pp. 88-90 of defendants' main brief. We note only that Mr. Siegal demonstrated his competence as a test constructor by creating what must be accepted as a competent, indeed almost perfect, measuring instrument (Defts. main brief, pp. 91-94). Thus the inference that he was a professionally inadequate "team leader" in the job analysis, or substantive side of the test, is highly improbable. He was responsible for the 1972 Correction Officer examination which the plaintiffs evidently found sufficiently adequate to withdraw their challenge. T. 8, A. 255.

*The qualifications of Tang and Decker from the Department of Civil Service and Ciuros and Harris, the two Corrections consultants (in addition to Sperbeck) are set forth in Defts. main brief, App. 1. It will be recalled that notwithstanding defendants' understanding that the resumes of these individuals would be accepted for the record, when plaintiffs excepted to their filing, defendants specifically requested that they be advised in what form plaintiffs would find them acceptable or; alternatively that the district court hold further hearings. Letter to the Hon. Morris Lasker from Judith A. Gordon, dated September 11, 1973, App. 1. Plaintiffs have taken no exception to defendants recollection of the events as described in the September 11th letter.

Moreover, both the district court and the plaintiffs must be taken as conceding that Mr. Siegal "knew the Sergeant job" when he developed 34-944. If plaintiffs accept the fact that Mr. Siegal knew that the job had changed between the Spring of 1970 when the job audits were conducted and October 1972 when 34-944 was administered (Plts. brief, pp. 23, 28), they must necessarily accept the fact that he knew what the job was. See district court opinion at A. 174-175.

Hylan Sperbeck's qualifications are reviewed in detail at pp. 87-88. We note only that Captain Sperbeck did look at the Sergeant job from the point of view of constructing a test. T. 740-745, A. 976-981; T. 550-552, A. 786-788. Compare Pltfs. brief, p. 25. He was away from line supervisor duties only because the Department found him good engough at his job (which had included being a Sergeant) that it wanted him to design and administer the curricula for Correction Officers and line supervisors as well. That he was at the Academy did not mean that he was away from the operating level since he paid constant visits to the institutions in the course of his duties at the Academy as well as being called to active line duty during emergencies such as Attica. While it is difficult to quarrel with the proposition that some subject experts maybe too close to the trees to see the woods and some too far from the woods to see the trees (Pltfs. brief, p. 25), its application to the quality of Captain Sperbeck as subject matter expert is illusive.

Examination No. 34-944 was job related even if not content valid.

Defendants demonstrated in their main brief, pp. 95-101 and Appendix 2, that examination no. 34-944 was job-related by comparing the job tasks set forth in the subtest descriptions for the examination (Pltfs. Ex. "3", A. 1322-1324; Pltfs. Ex. 8, A. 1332-1336) with the job tasks listed by the witnesses who discussed the content of the Sergeant job (Brief, pp. 97-98) and with the job tasks on the Correction Sergeant Duties Descriptions. (Defts. Ex. "R", A. 1785-1930) which were prepared by Corrections personnel independently of their work on 34-944 and were not used in generating that examination. On the first comparison, only first aid was found to be missing from the examination (Brief, p. 98). On the second comparison, only 11 tasks found on the Duties Descriptions did not appear in the examination and these (e.g. prepares bi-weekly mess schedule, makes arrangements to unload truck) are quite obviously minor. Defts. main brief, App. 2. bottom third, and pp. 98-101. Thus, examination no. 34-944 succeeded in covering all or substantially all of the important aspects of the Sergeant job. See Vulcan, 360 F. Supp. at 1274; 490 F 2d at 395.*

Plaintiffs except to comparison between the subtest descriptions and the Duties Descriptions on two grounds (Brief,

*See discussion in Defts. main brief, pp. 101-105, for a discussion of the "traits", in the district court (and plaintiffs at p. 33 of their brief) consider as missing from 34-944. As defendants' discussion shows, all the traits except "enpathy" (which was properly excluded) were in fact covered on the examination.

p. 34): "First, there is nothing in the record to support the premise that the duties statements are accurate job descriptions": and "[s]econdly, and more important, the record is similarly devoid of evidence to support the premise that the K S & A statements [subtest descriptions] bear any relationship to examination 34-944." With respect to plaintiffs' first point, the record establishes that the Duties Descriptions (Defts. Ex. "R") were in fact accurate descriptions of the Sergeant job. Commissioner Quick testified as how the Duties Descriptions were prepared, that they were accurate, that they were constantly updated and were in fact up to date. T. 444-445, A. 680-681; T. 469-475, A. 705-711 and Defts. Ex. "Q", A. 1783-1784. On the offer of the Duties Descriptions in evidence, plaintiffs' attorney stated (T. 475, A. 711): "We have no objection to their [Duties Descriptions and Plot Plans] admission for the purposes...[of] showing what the Correctional Services Department thinks that the duties and so on of the Sergeant jobs are as of October, 1972, and later." The descriptions are used for "bidding" (T. 473, A709) which determines the duties or post an employee is assigned in relation to his seniority and thus any claim of inaccuracy is improbable. It appears that plaintiff Hayes participated in drawing up the Duties Description for at least some of the Sergeant posts at Ossining. T. 488-489, A. 724-725. Finally, plaintiffs offered no evidence of any inaccuracy in the Duties Descriptions.

With respect to the second point concerning the relationship between the subtest descriptions and the test, Judge Lasker found that subtest descriptions in fact described "the five examination subtests" A. 176. The record establishes that the subtest descriptions were in fact the final stage of the job analysis specifically undertaken for 34-944 and were developed concurrently with the items plaintiffs now urge they do not reflect. See discussion pp. 18-19, ante. Simple comparison of the subtest descriptions with the items on the five subtests (Pltfs Ex. "18", A. 1355-1368 and Pltfs. Ex. "19", A. 1369-1371) shows their close relationship. Finally, plaintiffs offered no evidence to show that the subtest descriptions inaccurately reflected the test.

4. Defendants' conduct did not warrant the award of attorneys fees.

The district court rested its award of attorneys fees on the "private attorney-general" exception to the general rule that attorneys' fees are borne by the respective parties. A. 191. The errors in applying that approach have been previously discussed and will not be repeated here. Defts. brief, pp. 149-166. However, a more recent decision by Judge Lasker in Jones v. The New York City Human Resources Administration, ____ F. Supp. ____ (73 Civ. 3815, S.D.N.Y. 1/10/75) indicates that he did not in fact rely on the considerations which support the application "private attorney-general theory" in the case at bar. In sum, Judge Lasker indicates in Jones that his award of fees in this case did not rest on plaintiffs' vindication of Congressional policy of great importance, nor a benefit for large and amorphous class, nor the necessity and costliness of maintaining the action below, nor the fact few litigants would bring such actions if they were "routinely forced to bear their own attorneys' fees." Newman v Piggie Park Enterprises, 390 U.S. 400, 401 (1968).

In Jones et al. v. The New York Human Resources Administration, supra, a civil service testing procedure was again in issue, and Judge Lasker again found a disparate racial/ethnic impact coupled with a failure of proof of job-relatedness. In fashioning the relief, Judge Lasker denied plaintiffs' request for counsel fees in a one paragraph statement (Slip op. pp. 42-43):

> "Although counsel fees were awarded in Kirkland, 374 F. Supp. 1380-1382, they are not appropriate in the present suit. Kirkland involved an examination for the position of correction sergeant, whose preparation did not present the uniquely difficult problems involved in testing for the titles in issue here. Moreover, while in Kirkland there was an almost complete failure of proof on the issue of job-relatedness, we are impressed in the present case by the sincere efforts of Rosenberg and Williams to construct tests in accordance with the stringent legal standards applicable in this Circuit, however inadequate the examination proved to be."

Judge Lasker's attempted distinction of Jones from the case at bar shows that the real, if inarticulated, basis for the award of counsel fees herein was his view that either defendants merited a penalty because of their failure to create a job-related test or that they had acted in bad faith. No such allegation was made by plaintiffs below nor does the record

provide any support for such a theory.*

That defendants' posture in this action was not obdurate or urged in bad faith is clear from a study of the record. The case, from complaint to decision, took just under one year, approximately six months of which elapsed between submission of post-trial memoranda and the decision. The record is voluminous and contains at least 700 pages of documentary evidence alone (Joint Appendix, Volume III) concerning the disparate impact and job-relatedness of 34-944 which was provided almost exclusively by defendants during the course of

*The private attorney general theory is designed to lessen the burden on an individual litigant who furthers Congressional policies where the agencies of government charged with the enforcement of such policies are unable to or unwilling to act. Newman, supra; LaRaza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal., 1972); Lee v. Southern Homesites, 449 F. 2d 143 (5th Cir. 1971). Thus, the private attorney general theory rewards a plaintiff for rendering a public service. In contrast, a finding of obstinant, obdurate behavior to support an award based on bad faith is punitive, penalizing a defendant for wasting resources or advancing theories for which there are no reasonable basis in fact or in law, i.e. veatious litigation. See e.g. Newman, supra; Universal Oil Products v. Rost Refining Co., 328 U.S. 55 (1946); Rude v. Buchhalter, 286 U.S. 451 (1932). Where litigation is engaged in on a reasonable basis and in good faith, fees cannot be obtained under this theory. See, e.g. McAuliff v. Carlson, 386 F. Supp. 1245, 1150 (D. Conn. 1975), citing Stolberg v. Board of Trustees, 474 F. 2d 485 (2d Cir. 1973).

discovery. Moreover the procedures involved in the creation of 34-944 were akin to the practices approved by Judge Mansfield in Chance v. Board of Examiners, 330 F. Supp. 203, 218, 219 (S.D.N.Y. 1971), rather than those condemned by the Chance court. Id. at 219-220. Defts. main brief, pp. 58-61.*

Based on the foregoing factors coupled with plaintiffs' failure to avail themselves of the assistance of government agencies charged by Congress and the New York State Legislature with enforcing equal employment opportunities and which provide forums which do not require an attorney or asses costs to complainants, it cannot be said that defendants' position constituted obduracy or bad faith. Therefore, even upon this newly asserted basis, the district court abused its discretion in awarding attorneys' fees.

*Indeed, the similarlity between the procedures followed in the preparation of 34-944 and those approved in Chance, supra, provided the basis for defendants' decision to litigate this action, and thus to hold testing procedures which they believed distinguishable from those of the Board of Examiners and the several municipal civil service commissions which had been heard up to full legal scrutiny. Where the defendant N.Y.S. Department of Civil Service believed that litigation would be wasteful, it did in fact agree to settlement. Richardson v. N.Y.S. Civil Service Commission, 72 Civ. 1902, S.D.N.Y. (settlement reached with NAACP Legal Defense Fund). Compare Plfts. brief, p. 40.

CONCLUSION

FOR THE FOREGOING REASONS AND THOSE SET FORTH IN DEFENDANTS-APPELLANTS' MAIN BRIEF, THE ORDERS BELOW SHOULD BE REVERSED AND EXAMINATION NO. 34-944 DECLARED CONSTITUTIONAL. ALTERNATIVELY, THE CLASS DEFINITION AND RELIEF PROVISIONS OF THE ORDERS BELOW SHOULD BE MODIFIED TO ELIMINATE THE ERRORS ALLEGED IN POINTS III, IV AND IV OF DEFENDANTS-APPELLANTS' MAIN BRIEF AND POINTS 2 AND 4 HEREOF.

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Respectfully submitted,

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